COURT, U. S.

Supreme Court, U. S.
FILED
JUN 30 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1960

GENNARO J. ANGIULO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSEPH J. BALLIRO
65 East India Row, 30F
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction	1
Questions Presented	2
Federal Statutes Involved	2
Constitutional Provisions Involved	3
Statement of the Case	3
Argument for Allowance of the Writ	6
I. That the Transfer Be Upon the Defendant's Motion	7
Conclusion	11
Appendix	13

Table of Citations

Cases

Platt v. *Minnesota Mining and Manufacturing Co.*, 376 U.S. 240	6, 10
Stevens v. *Marks*, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed. 2d 724	6, 10, 11
Travis v. *United States*, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340	7
United States v. *Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236	7
United States v. *Marcello*, 423 F.2d 993	6, 10, 11

Constitutional Provisions

United States Constitution:	
Article III, Section 2	3, 7
Amendment VI	3, 6, 7

Statutes

	Page
18 U.S.C. §111	2
28 U.S.C. §1254(1)	1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

GENNARO J. ANGIULO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinion of the Court Below

The Opinion and Judgment of the United States Court of Appeals for the First Circuit entered on May 31, 1974 is unreported. A copy is attached as Appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

Questions Presented

Where a defendant moves, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure, to transfer the trial of his case to a district outside of the New England States, claiming all of the New England States are infected with prejudice, was it prejudicial for the Court to direct a transfer to the District of New Hampshire even though the defendant immediately and without delay requested permission to withdraw his motion rather than giving up venue in the District of Massachusetts in favor of the District of New Hampshire.

Federal Statutes Involved

The Federal Statutes involved in this Petition are as follows:

18 U.S.C. § 111. Assaulting, Resisting, or Impeding Certain Officers or Employees.

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Rule 21(a) Federal Rules of Criminal Procedure:

The Court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defen-

dant's motion, if the Court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding Court in that district.

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, ART. III, SECTION 2

"The trial of all crimes . . . shall be held in the State where the said crimes shall have been committed..."

UNITED STATES CONSTITUTION, AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed."

Statement of the Case

Petitioner was indicted for a violation of Title 18, United States Code 111, a single count, alleging an assault on a Federal officer. He was convicted on December 19, 1973 and sentenced to serve a thirty-day term of imprisonment and to pay a fine of two thousand dollars.

The relevant facts to this petition begin at a time prior to previous trial of this petitioner on the same indictment, and first conviction having been reversed on grounds not here in issue.

The indictment herein was returned by a grand jury sitting in the District of Massachusetts on September 6, 1972. Shortly after the indictment, the petitioner moved for a transfer from the District of Massachusetts, com-

plaining of prejudicial publicity ". . . in and about the District of Massachusetts." After hearing, the District Court found that the petitioner could not receive a fair trial at that time (January 8, 1973), and that if the same conditions existed at the time the case was ripe for trial, the case should be transferred to the Southern District of New York.

The case was called for its first trial on April 23, 1973, and the petitioner renewed his motion for transfer from the District of Massachusetts, contending that the publicity was at least as prejudicial as it had been several months previously, and requesting, in accordance with the prior recommendation of the Court, that the case be transferred to the Southern District of New York. The renewed motion was denied by visiting Justice Hon. Charles L. Powell; the petitioner was tried, convicted, and on appeal his conviction reversed for error in the supplemental charge to the jury.

Upon the case being redrawn for trial before the Hon. Andrew A. Caffrey, C.J., the petitioner on December 7, 1973 renewed his motion for transfer, incorporating previous materials submitted and appending additional media coverage of the first trial, appeal and reversal and coverage of the petitioner on other matters not relevant to his trial. In the body of his motion the petitioner directed the Court to his concern of this publicity infecting the ". . . New England States."

On the same date of filing the renewed motion for transfer, December 7, 1973, petitioner addressed a letter to the Hon. Hugh H. Bownes, to whom the case had been transferred, and enclosed a copy of the motion. In his letter accompanying the motion, petitioner advised the Court of his willingness to travel to any district outside of New England, to which the Court might be assigned and pointing out that if trial was had in such other district,

a saving of time would probably be effected in the jury selection procedure.[1]

In reply, by letter dated December 11, 1973 Judge Bownes informed petitioner that the case "was going to be transferred to New Hampshire for trial, and set a date . . . tentatively for the week of January 28, 1974.[2]

On December 12, 1973 notice was sent from the Clerk's Office in the District of Massachusetts, informing petitioner that trial had been set for Tuesday, December 18, 1973 at Courtroom 1, 12th Floor, Federal Building, Boston, Massachusetts.[3]

On December 14, 1973 Caffrey, Ch. J. held the hearing on petitioner's motion for transfer and explained part of the confusion as to date and place of trial as resulting from rescheduling of an antitrust case that Judge Bownes had been assigned to try. Petitioner informed the Court that consistently the petitioner had taken the position that if transfer were ordered that it be outside of New England.

After a colloquy which found the Court adopting the Government's position (The unaided memory will remain unaided) to the effect that the petitioner could receive a fair trial in the District of Massachusetts, the Court denied the petitioner's motion for a change of venue to a district outside of New England and allowed the motion to the extent that the case be, and it hereby is transferred to the District of New Hampshire. Petitioner immediately informed the Court that if the transfer to New Hampshire was in response to the petitioner's renewed motion, then the motion would be withdrawn and expressed strongly

---

[1] If such need arose as the result of petitioner's request for a change in trial dates.

[2] Petitioner received this letter on December 13, 1973. A hearing on his motion for transfer was scheduled for December 14, 1974 before Caffrey, Ch. J.

[3] This notice was also received on December 13, 1973.

that the petitioner would be even more sorely prejudiced trying this case in a small community than he would be in the metropolis of the Boston area. Expressing uncertainty as to whether the motion could be withdrawn, the Court nonetheless let the order stand.

Argument for Allowance of the Writ

Petitioner contends that this Petition should be granted, first, because the Court of Appeals has rendered a decision on a Federal question that is in conflict with this Court's opinion in *Stevens* v. *Marks,* 383 U.S. 234, 86 S. Ct. 788, 15 L. Ed.2d 724 and *Platt* v. *Minnesota Mining and Manufacturing Co.,* 376 U.S. 240, 245, 246; second, is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Marcello,* 423 F.2d 993, 1005; and third, deprives the petitioner of his constitutional right to be tried in the district where the crime was committed by cloaking the deprivation of this right with a mantle of discretion — a discretion that must be considered clouded by the declaration of the District Court of uncertainty as to whether the motion could be withdrawn but nonetheless ". . . let it stand."

The Sixth Amendment of the Constitution provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure, the petitioner filed a renewed motion to transfer the trial of his case to a district outside of New England. In ordering the transfer of this trial to the District

of New Hampshire, the District Court violated the two necessary conditions precedent of Rule 21(a):

1. That the transfer be upon the defendant's motion.
2. That the Court be satisfied that there is "... so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

I. That the Transfer Be Upon the Defendant's Motion.

The decision of whether to waive his constitutional right to be tried within the district of the crime, or seek an impartial jury elsewhere, is triggered by a motion made only by the defendant pursuant to Rule 21(a). The venue provisions contained in United States Constitution Article III Section 2 Clause 3 and Amendment Six cannot be dispensed with as being merely technical or procedural. *Travis* v. *United States*, 364 U.S. 631, 634, 81 S. Ct. 358, 5 L. Ed. 2d 340; *United States* v. *Johnson*, 323 U.S. 273, 276, 65 S. Ct. 249, 89 L. Ed. 236. Considering a question of venues in *United States* v. *Johnson, supra,* Justice Frankfurter admonished:

> "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." 323 U.S. at p. 276.

Chief Justice Burger, speaking for the dissent as a circuit justice in *Serio* v. *United States*, 377 F.2d 936 commented on the requirement of proper venue by observing at p. 941:

> "In more concrete terms this is a reminder of the long history of the repugnance of Englishmen and Americans to being 'transported for trial' to a place away from the scene of the charged events."

Assuming the Court finds great prejudice against a defendant, it may transfer, in accordance with Rule 21(a) ". . . to another district whether or not such district is specified in the defendant's motion . . ." In the instant case the motion filed by the defendant did not seek to choose a particular forum. It did seek to exclude the New England States on the basis of their all being infected with the adverse publicity that centered in Massachusetts. In colloquy with the hearing judge appellant reiterated concern expressed to Powell, J. at the previous motion for transfer over trying this case in a New England State and made clear that he was insisting on a trial in this district if the case were going to be transferred to a community smaller than Boston within the New England States.

In assaying the value of the position taken by petitioner it may be well to note the following:

1. In all three motions for transfer the defendant consistently took the position that there would be no alleviation of prejudice if the case were transferred to another State in New England and made pointed references to Maine, New Hampshire and Vermont.

2. Within the same year (January 26, 1973), after hearing and argument, United States Magistrate Princi's

findings concerning prejudice and recommendation of transfer to the Southern District of New York were adopted by Garrity, J.

3. Between the conclusion of the first trial on May 10, 1973 and the hearing before Caffrey, Ch. J. on December 14, 1973 there was a considerable amount of publicity adverse to the defendant.

4. The Government consistently maintained the defendant could receive as fair a trial in the District of Massachusetts as any place.

5. In ordering the transfer to the District of New Hampshire, the Court below did not make a finding, directly or indirectly, as required by Rule 21(a) that there existed in the District of Massachusetts ". . . where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial . . ."

6. Apparently, the hearing of December 14, 1973 was superfluous inasmuch as the transfer to New Hampshire had been an accomplished fact as far back as December 11, 1973 (Hon. Hugh J. Bownes, letter dated December 11, 1973).

In its "Memorandum and Order" dated December 14, 1973, the Court acknowledged the defendant's motion as being ". . . for a change of venue to a district outside of New England . . ." Although denying the motion, the Court referred to allowing it ". . . to the extent that *the case be,* and it is hereby, transferred to the United States District Court for the District of New Hampshire . . ." (Italics added). It may well be that the Court was proper in denying the defendant's motion, but the Court had no authority to alter the motion by including or adding, as *the case be,* a request that this case be transferred

to New Hampshire. The only motion before the Court was for a transfer outside of New England — hardly forum shopping in the light of the above listed circumstances and hard to be misunderstood in the light of the defendant's promptly expressed desire to withdraw the motion.

In *United States* v. *Marcello,* 423 F.2d 993, 1005, the Court of Appeals for the Fifth Circuit, although denying the defendant's request to vacate an order for change of venue, recognized the Court's power to do so in accordance with its sound discretion. In *Marcello,* however, the Court's refusal to vacate was based upon it having been made clear that the Court was going to transfer the case as a result of the motion made by the defendant "and proved by him" and that Marcello's "silence was approval of all that was going on" at p. 1005. More importantly in *Marcello* it appeared that it would have been "impossible" for the defendant to have received a fair trial in New Orleans, and although the Court recognized the "Stevens v. Marks, 1966, 383 U.S. 234, 86 S. Ct. 788, 15 L. Ed. 2d 724, stands generally for the proposition that a defendant ought to be allowed to withdraw a prior waiver of a Constitutional right when there is no justification otherwise, there was strong justification here."

In *Platt* v. *Minnesota Mining and Manufacturing Co.,* 376 U.S. 244, 245, 84 S. Ct. 769, 772, this Court said: "As we said in *United States* v. *Cores,* . . . : 'The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. . . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.' "

In *Stevens* v. *Marks,* 383 U.S. 244, 86 S. Ct. 788, this Court concerned itself with the waiver of the petitioner's Fifth Amendment right to not incriminate himself, and

assuming that a state could ". . . constitutionally exact, on pain of loss of employment and in absence of counsel, the waiver of a constitutional right, . . ." the Court nonetheless was hard pressed to find ". . . any justification for denying the right to withdraw it," and held that the petitioner's prompt effort to withdraw his waiver was effective. 383 U.S. at 243, 244.

In its decision, the Court below stated its agreement ". . . with the Fifth Circuit's formulation in *Marcello, supra* at 1005: 'A defendant ought to be allowed to withdraw a prior waiver of a constitutional right when there is no justification otherwise. . . .'" Opinion, page 4, Appendix, p. 16. The Court below then sought to justify the refusal to allow a withdrawal on the basis of the refusal being a reasonable use of discretion by finding adequate justification in a combination of (1) presuming that the Court felt the petitioner could not get a fair trial in Massachusetts and (2) a reluctance to hold that the petitioner was entitled to what the Court described as ". . . two bites of the apple: a right to seek transfer, and a right to withdraw is the announced transferee court was not to his liking." Opinion, page 5, Appendix, p. 17. In coming to this remarkable conclusion, the Court of Appeals had to ignore both the consistency with which the Petitioner had maintained his abhorrence at being transferred to a district outside of Massachusetts but within New England and, secondly, the expressed uncertainty of the District Court Judge concerning the right to withdraw—an uncertainty that is hardly compatible with a well reasoned exercise of discretion—if discretion there be.

Conclusion

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Dated at Boston, Massachusetts this eighteenth day of June, 1974.

Respectfully submitted,

JOSEPH J. BALLIRO
65 East India Row, 30F
Boston, Massachusetts

APPENDIX

United States Court of Appeals
For the First Circuit

No. 74-1068

UNITED STATES OF AMERICA,
APPELLEE,

v.

GENNARO J. ANGIULO,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Joseph J. Balliro, with whom *Henry D. Katz* was on brief, for appellant.

Richard S. Stolker, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Gerald E. McDowell*, Special Attorney, Boston Strike Force, and *Jerome M. Feit*, Attorney, Department of Justice, were on brief, for appellee.

May 31, 1974

PER CURIAM. Prior to his first trial Angiulo moved for transfer of venue on the ground that prejudicial publicity had made it impossible for him to obtain a fair trial "in and about the District of Massachusetts". His motion was denied. He was subsequently tried and convicted for assaulting a federal officer, in violation of 18 U.S.C. § 111. For reasons not material on this appeal, we vacated the judgment and ordered a retrial, 485 F.2d 37 (1973). He then renewed his motion for "transfer of the trial of this indictment from the District of Massachusetts to some other less prejudicial district" saying in support thereof

that he had been the victim of "prejudicial publicity . . . in and about the New England States".

Despite counsel's request, made during the hearing on the motion, that Angiulo be transferred to some jurisdiction outside New England, the district court announced that it was ordering the case transferred for trial in Concord, New Hampshire. When the court so announced, counsel stated that if the transfer to New Hampshire was in response to the renewed motion, then "we would withdraw that motion", since defendant would be more prejudiced trying the case in a small community than in the Boston metropolis. The court let the order stand.[1] Following a trial in New Hampshire, appellant was again convicted.

Angiulo now contends that his Sixth Amendment right to trial in the state and district "wherein the crime shall have been committed" was abridged because the district court disregarded F. R. Crim. P. 21(a) by granting a transfer other than "upon" his motion, and because it did not truly find that appellant could not obtain a fair and impartial trial in Massachusetts. We affirm the judgment of the district court.

Rule 21(a) authorizes the court to transfer a criminal case to a district other than the district where the prosecution is pending, "whether or not such district is specified in the defendant's motion" for transfer. Here, the operative words in the motion were for a transfer from Massachusetts to "some less prejudicial district". The motion on its face did not preclude transfer within New En-

---

[1] The order as entered was as follows: ". . . The motion for change of venue, to the extent that it requests a transfer from this district to a district outside the First Circuit, is denied. However, the motion is allowed to the extent that the case be, and it hereby is, transferred to the United States District Court for the District of New Hampshire . . . ."

gland,[2] and, under the Rule, Angiulo would have had no right to foreclose the court's transfer options. Once appellant moved for transfer of venue, the decision about where to transfer was within the discretion of the trial court, *United States* v. *Marcello,* 280 F. Supp. 510, 520 (E.D. La. 1968), *aff'd,* 423 F.2d 993 (5th Cir.), *cert. denied,* 383 U.S. 959 (1970); 1 Wright and Miller, Federal Practice § 342 (1969 ed.); *cf. United States* v. *Projansky,* 465 F.2d 123 (2d Cir. 1972). Angiulo's assertion, voiced at the hearing on his motion, that New Hampshire was not a district "less prejudicial" than Massachusetts need not have controlled the court's determination. The evidence of possible prejudice within New England consisted largely of clippings from Boston-area newspapers. We cannot say that the trial court abused its discretion by concluding that the same degree of prejudice would not exist in New Hampshire.

We have little hesitancy in deciding, therefore, that the court had before it a transfer motion suitable under Rule 21(a), and that it had authority under the Rule to select New Hampshire notwithstanding counsel's oral objection. The more difficult question is whether, notwithstanding the court's compliance with Rule 21(a), Angiulo sufficiently waived his constitutional right not to be tried at "a place away from the scene of the charged events". *See Serio* v. *United States,* 377 F.2d 936, 941 (D.C. Cir. 1967) (Burger, J., concurring and dissenting). Angiulo properly reminds us that "Questions of venue in criminal cases . . . are not matters of formal legal procedure. They raise deep issues of public policy in the light of which

[2] Counsel did state at the beginning of the hearing on the motion that his client did not want to be tried in any other New England jurisdiction. But whether this statement was meant to "qualify" or "condition" the motion or was intended merely to state a preference which the court could accept or ignore as it chose, is less than clear.

legislation must be construed." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). Here we must take account both of his right to a trial in the viscinage and his potentially conflicting right to trial before an unprejudiced jury. And to discourage forum shopping and unwarranted delay, we must not be so perfectionistic as to thwart unduly the resolution of such rights in the district court prior to trial.

We think Angiulo's written motion was a waiver of his constitutional right to a trial in the viscinage. As stated *ante*, note 2, counsel's oral requests prior to the court's ruling cannot be said to have changed or conditioned the relief sought. Angiulo's skilled and conscientious counsel had consistently taken the position, supported by an array of newspaper clippings, that media publicity precluded a fair trial in Massachusetts. Although presentation of the merits at the first trial lasted less than a day, selection of the Massachusetts jury had taken a full day. The district court was entitled to conclude that Angiulo, after deliberation and with competent advice, had determined that a trial in the District of Massachusetts was not in his interest. The case therefore bears little resemblance to those where confused or poorly counselled individuals have purported to surrender constitutional rights.

Nonetheless, there remains the question whether the district court should have allowed Angiulo's request, made immediately after the court's ruling, to withdraw the transfer motion. This is a close question, and we do not agree with the district court's suggestion that it may have lacked power to allow withdrawal. We agree with the Fifth Circuit's formulation in *Marcello, supra* at 1005: "A defendant ought to be allowed to withdraw a prior waiver of a constitutional right when there is no justification otherwise. . . ." However, the issue before us is not whether we agree with the district court's refusal to permit withdrawal but whether we believe its failure to

do so was an abuse of discretion. We find adequate justification. First, we are unwilling to presume, as appellant would have us do, that the district court did not have serious and well-founded reservations about Angiulo's ability to have a fair trial in Massachusetts.[3] This being so, it was entitled to weigh appellant's due process rights against withdrawal of the waiver. It could also deem it preferable to hold the trial in a district where there was less risk of reversible error from problems associated with jury prejudice. The court also was entitled to conclude that the asserted basis for withdrawal — defendant's desire to be tried in a city rather than a smaller community — had nothing to do with the historic reasons associated with the constitutional protection against being "transported for trial". *Serio, supra* at 941. Finally, for us to override the district court in these circumstances would be to hold that defendant was entitled to two bites of the apple:[4] a right to seek transfer, and a right to withdraw if the announced transferee court was not to his liking. We do not believe that a reasonable balancing of all the interests involved, including the public's interest in preventing Rule 21(a) from being utilized as a forum shopping device, necessitates so enlarging a defendant's tactical options as a matter of absolute right. While suggestions in this direction have been made, *see* Note, *Change of Venue in Criminal Cases: the Defendant's Right to Specify the County of Transfer,* 26 Stan. L. Rev. 131 (1973), we

---

[3] We do not read the record as indicating a contrary view.

[4] Or, to mix metaphors,

> "A litigant cannot experiment with the judge presiding over the case. . . . We cannot permit a litigant to test the mind of a trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge."

State ex rel. Shufeldt v. *Armigo,* 39 N.M. 502, 506, 50 P.2d 852, 855 (1935), quoted in *In Re United Shoe Machinery Corp.,* 276 F.2d 77, 79 (1st Cir. 1960).

do not accept them. If specific circumstances in the transferee district had thereafter threatened defendant's right to a fair and impartial trial, these might have been called to the transferee court's attention. *Cf. United States* v. *Holdsworth,* 179 F.2d 933, 937 (1st Cir. 1950). Here there is no complaint concerning the course of subsequent events in New Hampshire. Having waived his right to be tried in Massachusetts, defendant was tried in New Hampshire before a fair and impartial jury. That is all he was entitled to expect.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1960

GENNARO J. ANGIULO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in ordering a change of venue from the District of Massachusetts to the District of New Hampshire and in declining to change its decision after the application for transfer was withdrawn.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of assaulting an officer of the United States Coast Guard, in violation of 18 U.S.C. 111, and was sentenced to one year's imprisonment (the last nine months of which was ordered suspended in favor of two years' probation) and a fine of $2,000 (App. 6).[1] Prior to trial, defense motions for a change of venue had been denied (App. 1-4).

[1] "App." refers to the Appendix filed in the court of appeals.

The court of appeals reversed because of errors in a supplemental charge to the jury, 485 F. 2d 37, and ordered a retrial (App. 7). Petitioner then renewed his motion for a transfer (App. 59), asserting that "prejudicial saturation-type publicity from all media of communication in and about the New England States" warranted the "transfer [of] the trial of this indictment from the District of Massachusetts to some other less prejudicial district." The motion was accompanied by examples of newspaper articles printed in Boston; no publicity in other New England states was adduced. Following a hearing, the court ordered the case transferred to the District of New Hampshire for trial (App. 87). Petitioner was again convicted of assault, and was sentenced to imprisonment for thirty days and a fine of $2,000.

We rely upon the analysis of the court of appeals (497 F. 2d 440; Pet. App. 13-18).

1. Fed. R. Crim. P. 21(a) and the decisions interpreting it necessitate a two-stage analysis of defendant's motion for a change of venue on account of prejudical publicity. First, the motion is a waiver of the constitutional right to trial in the vicinage; once a defendant has stated that he is willing to accept trial elsewhere, he has surrendered his right under the Sixth Amendment and Article III, Section 2. Second, once this right has been surrendered the district court, so long as it does not abuse its discretion, is entitled to transfer the case for trial in any district in which the defendant can receive a fair trial. The defendant cannot select a specific district of transfer. *United States* v. *Marcello,* 280 F. Supp. 510, 520 (E.D. La.) (collecting cases), affirmed, 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959.

Petitioner does not question this rule, nor does he assert that he was tried in New Hampshire before a biased jury. Had the New Hampshire venire been prejudiced, the court below held, petitioner could have moved for a retransfer (497 F. 2d at 442; Pet. App. 18).

2. Petitioner nevertheless argues that he is entitled to different treatment because his motion sought not merely transfer from Massachusetts but transfer outside the "New England States." To transfer the case to New Hampshire, he argues, is equivalent to denying the motion made and therefore is in violation of Rule 21(a) because not made "upon the defendant's motion." The argument is not supported by the record. Petitioner moved for "transfer [of] the trial of this indictment from the District of Massachusetts to some other less prejudicial district" (App. 59; 497 F. 2d at 441; Pet. App. 13). As the court of appeals found, the motion on its face did not state that it was conditioned on transfer outside New England. Although counsel did note orally at the hearing on his motion that he sought transfer outside New England, this statement was apparently precatory rather than conditional. The court of appeals resolved against a reading of petitioner's motion as conditional (497 F. 2d at 441, n. 2; Pet. App. 14-15). That resolution is not clearly erroneous, and there is no occasion to review it here.

3. Petitioner finally argues that, however the motion is read, it was error for the district court not to allow his motion, made immediately after the court had transferred the case to New Hampshire, to withdraw the motion to transfer. Petitioner asserts that the decision below is at variance with those cases recognizing a general right to withdraw waivers of constitutional

rights. There is no conflict; the court below followed *Stevens* v. *Marks*, 383 U.S. 234, and *United States* v. *Marcello, supra,* 423 F. 2d at 1005, by expressly recognizing the right, under appropriate circumstances, to withdraw a waiver (497 F. 2d at 442; Pet. App. 16-17). However, the First Circuit, as had the Fifth Circuit in *Marcello*, ruled that the district court had not overstepped its discretion in refusing to allow withdrawal.

Two considerations support this outcome: (a) A motion to transfer is usually based upon prejudice in the original district. Although a defendant may seek to withdraw his waiver, the court has an obligation to satisfy itself that the trial in the original district will be fair. Thus the very reasons that would lead a court to grant defendant's motion under Rule 21(a) to transfer also militate against allowing him to withdraw unless he can point to a change in circumstances between the time when the motion is filed and the time when withdrawal is sought. (b) The timing of the motion to withdraw gave some indication that defendant's counsel may have been seeking "two bites of the apple" (497 F. 2d at 442; Pet. App. 17): *i.e.*, he was willing to accept the transferee district only if to his liking. In the interest of proper judicial administration, the court correctly declined to allow petitioner to make motions the results of which he could accept or abandon at his option. The situation plainly would have been different if extrinsic factors explained the decision to withdraw the motion for transfer. See *Marcello, supra*, 423 F. 2d at 1004.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.